STATE OF MICHIGAN

COURT OF APPEALS

JOHNNY LEE NELSON, Personal Representative of the ESTATE OF DORIS NELSON,

Plaintiff-Appellant,

v

LYNN GRAY, M.D.,

Defendant-Appellee,

and

LAKELAND REGIONAL HEALTH SYSTEM, a/k/a LAKELAND REGIONAL MEDICAL CENTER, and ST. JOSEPH MEDICAL ASSOCIATION,

Defendants.

UNPUBLISHED
August 26, 2003

No. 236369
Berrien Circuit Court
LC No. 98-003934-NM

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment entered in favor of Lynn Gray, M.D., following a jury verdict of no cause of action against plaintiff on his medical malpractice claim.[1] We affirm.

On the evening of December 10, 1996, Doris Nelson arrived by ambulance to the emergency room at Lakeland Regional Medical Center with a primary complaint of chest pain. She was discharged later that evening and returned to her home. In the early morning hours of

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[1] Before trial, St. Joseph Medical Associates was granted summary disposition and Lakeland Regional Health Systems was dismissed with prejudice on a stipulation signed by the parties. Jerome Kuhnlein, M.D., was a party defendant to the action below and also received judgment in his favor following the jury's verdict of no cause of action. Dr. Kuhnlein was originally named a party to this appeal, but was later dismissed with prejudice by stipulation.

December 11, 1996, she returned to the emergency room in critical condition, having an acute myocardial infarction. She underwent emergency surgery, but arrested at 6:15 a.m. She was removed from life support that evening and passed away. Johnny Nelson, Doris' husband, as personal representative of her estate, subsequently filed this medical malpractice lawsuit. He alleged, in relevant part, that Dr. Lynn Gray, the emergency room physician, and Dr. Jerome Kuhnlein, who consulted with Dr. Gray by telephone, breached the standard of care when they misdiagnosed Doris with unstable angina and discharged her from the emergency room on December 10, 1996.

Plaintiff first argues that the trial court abused its discretion when it determined that emergency room specialists, not board-certified family practitioners, were required to provide expert testimony at trial. Decisions regarding an expert's qualifications and decisions regarding the admissibility of an expert's testimony are reviewed for an abuse of discretion. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002). The interpretation and application of a statute presents a question of law, which is reviewed de novo. *Id*.

Dr. Gray moved to preclude testimony from two board-certified family practitioners, who were retained as experts by plaintiff. The trial court granted the motion, ruling that Dr. Gray was an emergency room specialist and that an expert in the specialty being practiced at the time of malpractice, emergency medicine, was required. We find no abuse of discretion in the trial court's ruling.

MCL 600.2169 provides, in relevant part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

In interpreting a statute, "[t]he legislature is presumed to have intended the meaning it plainly expressed. If the language of a statute is clear and unambiguous, judicial construction is not permitted, and the statute must be applied as written." *Fournier v Mercy Community Health Care*, 254 Mich App 461, 466; 657 NW2d 550 (2002) (citations omitted). We "presume that every word has some meaning and should 'avoid any construction that would render the statute, or any part of it, surplusage or nugatory.'" *McClellan v Collar (On Remand)*, 240 Mich App 403, 410; 613 NW2d 729 (2000) (quotation omitted).

The plain language of MCL 600.2169 recognizes that physicians may be specialists and not be board certified in the specialty. If all specialists were board-certified, the portion of the statute pertaining simply to "specialists" would be rendered nugatory. We will not ignore the plain language of the statute to reach a conclusion that the term "specialist" includes only board-

certified physicians. And, we recognize that physicians may have more than one area of specialty or board certification. See *Tate, supra.*

We further recognize that emergency medicine is a medical specialty. *Carolyn v Mut of Omaha Ins Co,* 220 Mich App 444, 447; 559 NW2d 407 (1996). At trial, the testimony was undisputed that emergency medicine was recognized as a specialty by the American Board of Specialties in the 1970s. Because residencies for emergency medicine began emerging in the early 1980s, many older, emergency room physicians were educated before emergency medicine residencies were available. Although Dr. Gray was not board certified in emergency medicine and had not completed a residency in emergency medicine, he was a member of the American College of Emergency Physicians and was practicing emergency medicine full time at the time of the alleged malpractice. He started working in emergency medicine part time in 1979 and continued to do so until he made emergency medicine his full-time practice in 1995. There was no dispute that he was competent to practice emergency medicine full time, that he was doing so, and that he had the experience and on-the-job training to do so. The evidence supported that Dr. Gray was an emergency room specialist notwithstanding his lack of board certification. Dr. Gray was also a board-certified family practitioner. Thus, he had two specialties.

Given that Dr. Gray was a specialist in both emergency medicine and family practice, it is necessary to resolve whether emergency medicine or family practice experts were required to establish the standard of care, breach of that standard, and causation. This issue was resolved in *Tate, supra,* where this Court ruled:

> Subsection 2169(1)(a) specifically states that an expert witness must "specialize[] at the time of the occurrence that is the basis for the action" in the same specialty as the defendant physician. The statute further discusses board-certified specialists and requires that experts testifying against or on behalf of such specialists also be "board certified in that specialty." *The use of the phrase "at the time of the occurrence that is the basis for the action" clearly indicates that an expert's specialty is limited to the actual malpractice. Moreover, the statute expressly uses the word "specialty," as opposed to "specialties," thereby implying that the specialty requirement is tied to the occurrence of the alleged malpractice and not unrelated specialties that a defendant physician may hold.* [*Id.* at 218; emphasis added.]

The Court accepted that the purpose of MCL 600.2169 was, in part, to insure that, in medical malpractice suits against specialists, the expert witnesses actually practice in the same specialty. *Id.* at 218-219.

In this case, the alleged malpractice was within the purview of emergency medicine. Dr. Gray was an emergency room specialist practicing emergency medicine on a patient in the emergency room at the time of the alleged malpractice. The plaintiff's family practice experts were not specialists in emergency medicine and, thus, their specialties did not match the specialty being practiced at the time of the malpractice. Thus, it was not an abuse of discretion

to preclude their testimony.[2] Conversely, Dr. Gray's expert specialized in emergency medicine and was an appropriate match under MCL 600.2169.

Defendant next argues that the trial court erred by precluding testimony from Ryan Cronk, the paramedic who transported Doris to the hospital on December 10, 1996. Cronk testified at deposition that, in his assessment, Doris was suffering from unstable angina when she presented to the emergency room. The trial court precluded the testimony on the ground that it was irrelevant under MRE 401, cumulative or confusing under MRE 403, and not admissible under MRE 701. We review a trial court's decision whether to admit evidence for an abuse of discretion. *Holton v A+ Ins Assoc, Inc,* 255 Mich App 318, 322; 661 NW2d 248 (2003).

On appeal, plaintiff primarily focuses on his argument that Cronk's testimony was admissible under MRE 702. However, this argument was waived by plaintiff's counsel at trial when she specifically informed the trial court that she was not offering the testimony as expert testimony. *People v Carter,* 462 Mich 206, 215-216; 612 NW2d 144 (2000). Waiver extinguishes error. *Id.* at 215. We will not, therefore, address whether Cronk's testimony was admissible under MRE 702.[3]

In addition, we find that any argument with respect to the trial court's ruling is abandoned. Plaintiff fails to explain or rationalize his position that Cronk's testimony was neither cumulative nor confusing. He also fails to cite any testimony to support that Cronk's assessment was admissible as a lay opinion under MRE 701. It is improper for an appellant to announce his position and leave it to this Court to discover and rationalize the basis for his claims or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Mudge v Macomb Co,* 458 Mich 87, 105; 580 NW2d 845 (1998). Also, where a plaintiff fails to address the basis of the trial court's decision, this Court is not required to consider granting plaintiff the relief sought. *Joerger v Gordon Food Service, Inc,* 224 Mich App 167, 175; 568 NW2d 365 (1997).

In any event, we note that the trial court did not abuse its discretion. Cronk's assessment of Doris' condition was not a diagnosis, nor did he possess sufficient information or credentials to diagnose her condition. Further, he did not relay his impression to Dr. Gray, and thus, his assessment was irrelevant to the issue of whether Doris was properly diagnosed and treated within the standard of care. MRE 401. Moreover, given the distinction Cronk made between his "assessment" and a physician's "diagnosis," we find the proposed testimony was potentially confusing and likely to mislead the jury. MRE 403.

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[2] In determining this issue, we note that the trial court's ruling did not prejudice plaintiff in any way. The ruling was made more than one year before trial. Plaintiff retained, deposed, and presented two emergency room specialists, who were also board certified in family practice, to testify against Dr. Gray at trial. Plaintiff does not argue that the originally retained family practice experts had additional relevant testimony to offer that was not cumulative to that offered by his experts at trial. Plaintiff was fully able to present his case to the jury.

[3] The concepts of waiver and forfeiture as explained in *Carter, supra,* apply equally to civil cases. See *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57, 69; 642 NW2d 663 (2002).

Finally, defendant argues that the trial court abused its discretion by limiting his cross-examination of Dr. Gray's expert witness. We disagree. The determination of the scope of cross-examination is reviewed for an abuse of discretion. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Id.*

The interest, bias or prejudice of a witness, including an expert witness, is a proper subject of cross-examination. MRE 611(b). It is proper to cross-examine the expert about the number of times he testified in court or was involved in a particular type of case. *Wilson v Stillwell*, 411 Mich 587, 599-600; 309 NW2d 898 (1981). It is also proper to cross-examine an expert to show a pattern of testimony for a particular attorney or a particular category of plaintiffs or defendants. *Id.* at 600-601. However, "such testimony is only minimally probative of bias and should be carefully scrutinized by the trial court." *Id.* at 601. Evidence of an expert's credibility is generally admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. *Wischmeyer v Schanz*, 449 Mich 469, 475; 536 NW2d 760 (1995).

In this case, plaintiff was permitted to cross-examine Dr. Gray's expert about the number of malpractice cases for which he was consulted, the fact that his consultations were always for defendants, and the fact that he was previously hired by defense attorneys on other cases. In addition, plaintiff elicited that the expert was also hired by other major defense firms in Michigan. Plaintiff was precluded only from eliciting testimony that the expert primarily reviewed cases for insurance companies. We find no abuse of discretion in the decision. The questioning about the expert's reviews for insurance companies would have suggested that Dr. Gray had insurance and was represented by insurance company lawyers. Evidence that a person is insured is generally impermissible. MRE 411. Dr. Gray's insurance status was not a relevant issue and did not reflect on his expert's bias. Moreover, any arguable probative value the testimony may have had to demonstrate the expert's bias was clearly outweighed by the danger of unfair prejudice to Dr. Gray by way of the introduction of the idea of insurance to the jury. Under the circumstances, the trial court properly curtailed plaintiff's cross-examination of the expert.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray